

BerThe Djakaridja Vs. State

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Court : Delhi

Decided On : Oct-14-1997

Reported in : 1998IIAD(Delhi)888; 72(1998)DLT161; 1998(44)DRJ33

Judge : A.D. Singh, J.

Acts : Narcotic Drugs & [Psychotropic Substances Act, 1985](#) - Sections 21

Appeal No. : Criminal Appeal No. 187 of 1994

Appellant : BerThe Djakaridja

Respondent : State

Advocate for Pet/Ap. : Jatinder Sarin,; Neeraj Chandhary,; Vivek Sehgal and;

Judgement :

Anil Dev Singh, J.

(1) This is an appeal against the judgment and order of learned Additional Sessions Judge dated August 17, 1994 whereby the appellant has been convicted under Section 21 of the Narcotic Drugs and [Psychotropic Substances Act, 1985](#) (for short 'the N.D.P.S. Act') and has been sentenced to undergo rigorous imprisonment for ten years and to pay a fine of Rs.1 lac, and in default of payment of fine, to further undergo rigorous imprisonment for six months. The facts giving rise to this appeal lie in a narrow compass.

(2) The appellant is a foreign national. On May 22, 1990 the appellant came to the I.G.I. Airport and presented his passport issued at Abidjan to the Immigration Officer for the purpose of immigration clearance as he was to board Turkish Airways Flight No. TK-575 for Istanbul. The Immigration Officer entertained a suspicion about the authenticity of the passport and referred the matter to Inspector Sushil Kumar (Public Witness-7). On investigation the passport presented by the appellant was found to be forged. A ruca in this regard was sent to the concerned Police Station on the same day at about 3.30 A.M. with regard to an offence punishable under sections 419/420 Indian Penal Code and section 14 of the Foreigners Act. The luggage of the appellant was also searched which resulted in recovery of 2.4 kgs. of smack concealed in the false bottom of a suitcase. 100 grams of smack was separated by the Investigating Officer for the purposes of sample. The sample was converted into a packet which was sealed with the seal 'PN'. The remaining case property was sealed in a separate bundle with the same seal. The seal was handed over to Si Dev Raj. It is the further case of the prosecution that Sho Ved Parkash Sharma (Public Witness-5) also sealed the parcels with his seal 'VPS'. The packets containing the case property and the sample were deposited in the Malkhana. The sample parcel along with the CfsI Form was sent for analysis to the C.F.S.L. As per the report dated July 9, 1990 of the C.F.S.L. the sample tested positive for heroin. After investigation a challan was filed against the appellant and he was charged under section 21 of the N.D.P.S. Act. The appellant pleaded not guilty to the charge and claimed trial.

(3) The prosecution examined a number of witnesses in support of its case. The trial court found the appellant guilty of having committed an offence under section 21 of the N.D.P.S. Act. Consequently it convicted and sentenced the appellant to undergo rigorous imprisonment for 10 years and to pay a fine of Rs.1 lacs, and in default of payment of fine, to further undergo rigorous imprisonment for six months. The appellant feeling aggrieved of the order of the trial court has filed the instant appeal.

(4) I have heard learned counsel for the parties and have gone through the record. The statements of S.H.O. Ved Prakash Sharma (Public Witness-5), Moharrar Malkhana Hc Ram Dhan (Public Witness-3), Constable Sukhvinder Singh (Public

Witness-6) and Investigating Officer Inspector Sushil Kumar (Public Witness-7) recorded by the trial court reflect various infirmities in the prosecution case. All of them have stated that C.F.S.L. Form was deposited along with the case property in the Malkhana. They were confronted with their statements made under section 161 Code of Criminal Procedure where this was not so stated. This is a serious omission which throws doubt on the veracity of their statements with regard to the deposit of the C.F.S.L. Form in the Malkhana. There is another infirmity in the prosecution case. Io Inspector Sushil Kumar (Public Witness-7) is stated to have sealed the parcel containing sample with the seal 'PN'. In his statement he was not able to state the particulars of the person from whom the seal was taken. It is imperative for the Investigating Officer to seal the packet containing the sample with his own seal. In case his seal is not available for some reason then in that event he could use the seal of another Police Officer, but he must explain the circumstances under which the seal of another officer was used. Under section 55 of the N.D.P.S. Act, 1985, it is mandatory for an officer in charge of the Police Station concerned to affix his seal on the packets containing the samples taken from the articles seized under the N.D.P.S. Act. In the instant case it is claimed that the S.H.O. had affixed his seal on the packets, but from the seizure memo Ext.Public Witness2/A it is apparent that only the seal of 'PN' was affixed by the Investigating Officer (Public Witness-7). In the seizure memo there is no mention of the S.H.O. affixing the seal on the case property and the sample packet. The contradictions in the statements of the above said witnesses create a doubt regarding the claim of the prosecution that the C.F.S.L. Form was filled up at the proper time, seal 'VPS' was affixed thereon and the form was sent along with the case property to the C.F.S.L. It is also not established beyond reasonable doubt by the prosecution that the C.F.S.L. Form was deposited with the Moharrar Malkhana. The benefit of doubt, therefore, must be given to the appellant.

(5) Learned counsel appearing for the respondent submitted that the C.F.S.L. Report (Ext.Public Witness 9/D) shows that the C.F.S.L. Form accompanied the case property. He has invited my attention to the cyclostyled report where only the blanks were filled in. It is true that a line in the report does say that one sealed parcel was received with seal of 'PN' & 'VPS' as per official specimen enclosed, but except the words 'PN' and 'VPS' the entire line is a cyclostyled one. The

cyclostyled portion reads as under:-

'Received one sealed parcel with seal intact _____ as per official specimen enclosed.'

(6) Much significance cannot be attached to the above said entry in the cyclostyled form (Ext.Public Witness 9/D) as it appears to me that the same appears to have been made in a mechanical and routine manner. This view finds support from the fact that the relevant entry Ext.Public Witness 3/A made in the Malkhana register does not talk of the deposit of the C.F.S.L. Form in the Malkhana nor does it make any reference to the dispatch of the C.F.S.L. form to the C.F.S.L. along with the sample. What it states is as follows:

Today, 29.5.90, one sample packet sealed with the seal 'PN' & 'VPS' has been sent vide Rc No. 18/21 through Ct. Sukhvinder 672/P for examination for the Cfsi Lodi Colony.

(7) Learned counsel for the respondent submitted that in the register under the column 'description of property' there is a mention of the C.F.S.L. Form having been filled up. It appears that in this column the contents of the seizure memo have been extracted. Even the contents of this column do not reflect that the C.F.S.L. form was deposited with the Moharrar Malkhana. What is stated in the seizure memo is that the seal after filling C.F.S.L. Form was handed over to Si Dev Raj. There is nothing else in this column beyond extracting the seizure memo. In view of these infirmities in the link evidence the possibility of the sample being tampered with cannot be ruled out. I am supported in this view by the decisions of this Court in Safiullah v. State (Delhi Admn), 1993 Jcc 33; Mool Chand v. State, 1993 Jcc 234; Amarjit Singh and another v. State (Delhi Admn), 1995 Jcc 91; and Abdul Ghaffar (in custody) v. The State (Delhi Admn), 1996 Jcc 497. In such a situation the conviction and sentence recorded by the learned Additional Sessions Judge against the appellant requires to be set aside.

(8) Accordingly, the appeal is accepted and the impugned order dated August 17, 1994 is set aside. The appellant is acquitted of the charge under section 21 of the N.D.P.S. Act and is directed to be set at liberty forthwith unless required in some

other case.

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